Supreme Court, U.S.
FILED
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92-327

No. _____

IN THE

SUPREME COURT
OF THE UNITED STATE

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,
Petitioner,

versus

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE SUPREME COURT

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Attorney for Petitioner

JACK DAVID KELLY
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(904) 438-4785
Petitioner

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE FLORIDA COURT IMPROPERLY TRANSFERRED A COMPLAINT TO SET ASIDE A MERGER TO ANOTHER JURISDICTION.

B. WHETHER THE FLORIDA SUPREME COURT IMPROPERLY DECLINED TO HEAR PETITIONER'S APPEAL CITING ITS REASON AS LACK OF JURISDICTION.

C. WHETHER THE FLORIDA COURT ERRONEOUSLY APPLIED THE LOCAL ACTION RULE TO PETITIONER'S COMPLAINT THEREBY TRANSFERRING HIS ACTION TO ANOTHER JURISDICTION NOT OF PETITIONER'S CHOICE.

D. WHETHER THE ACTIONS OF THE FLORIDA COURTS HAVE DEPRIVED PETITIONER OF HIS RIGHTS WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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OPINIONS IN THE CASE BELOW

The lower courts have not issued a written opinion other than the District Court of Appeal, First District, State of Florida's Opinion, Per Curium Affirmed (A-1) and the Opinion of the Florida Supreme Court's Opinion declining jurisdiction (A-2).

STATEMENT AS TO JURISDICTION

Pursuant to 28 U.S.C. and Rule 10.1, the Supreme Court has discretionary power to review Final Orders of a State's highest court of last resort that has deprived an individual of his rights guaranteed by the United States Constitution.

The decree sought to be reviewed was entered March 10, 1992, by The Supreme Court of Florida denying jurisdiction to review the Per Curium Affirmed decision by the District Court of Appeal, First District, State of Florida, entered November 7, 1991, together with the denial of Petitioner's Motion for Rehearing entered December 19, 1991.

The Court has granted two extensions of time within which to filed the Petition for a Writ of Certiorari which are dated June 11, 1992, and July 13, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to 28 U.S.C. and Rule 10.1, the Supreme Court has discretionary power to review Final Orders of a State's highest court of last resort that has deprived an individual of his rights guaranteed by the United States Constitution.

The decree sought to be reviewed was entered March 10, 1992, by The Supreme Court of Florida denying jurisdiction to review the Per Curium Affirmed decision by the District Court of Appeal, First district, State of Florida, entered November 7, 1991, together with the denial of Petitioner's Motion for Rehearing entered December 19, 1991.

The Court has granted two extensions of time within which to filed the Petition for a Writ of Certiorari which are dated June 11, 1992, and July 13, 1992.

I. STATEMENT OF THE FACTS

On August 2, 1992, Petitioner, hereinafter referred to as Maple Leaf, filed in Leon County, Florida Circuit Court, and amended complaint against Respondent, hereinafter referred to as Tree Farm, seeking to set aside a purported merger between Maple Leaf and Tree Farm. (A-3)

Maple Leaf contends in its complaint that a merger did not take place due to failure of conditions that were required to occur before merger could take place.

Various motions were filed by Tree Farm seeking transfer of Maple Leaf's complaint. No answer was filed to Maple Leaf's complaint.

A hearing was conducted in Leon County, Florida on Tree Farm's Motion to Dismiss for Lack of Subject Matter Jurisdiction and to abate or in the alternative transfer for improper venue. (A-4)

On March 12, 1991, the Leon County Court entered its order improperly transferring Maple Leaf's case to the Circuit Court of Escambia County, Florida, stating in paragraph one of its order

> 1. This action involved a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the actions is, therefore, a "local action" it should have been filed in Escambia County, Florida.

(A-5)

From this action by the lower court Maple Leaf appealed to the District Court of Appeal, First District, State of Florida, arguing that the complaint for relief filed in the lower court did not involve the subject matter of real property but involved the subject matter of merger and, therefore, the action should not have been transferred to the Circuit Court of Escambia County, Florida.

The District Court of Appeal, First District, State of Florida, Affirmed the lower court's Opinion on November 7, 1991.

Petitioner timely filed his Motion for Rehearing (A-6). This Motion for Rehearing was denied on December 19, 1991.

Petitioner filed his appeal to the Florida Supreme Court along with his Motion to Accept Jurisdiction, arguing that the lower court's actions have deprived him of his rights to due process of law. (A-7)

On March 10, 1992, the Supreme Court of Florida did not accept jurisdiction and from this decision Petitioner is seeking review by the United States Supreme Court in that the lower court's actions are depriving Petitioner of his rights without due process of law.

II. ARGUMENT FOR GRANTING THE WRIT

The Supreme Court man grant a Writ of Certiorari when a state court violated its citizen of their rights under the United States Constitution. The instant case presents such a questions.

Based on the facts presented below, Petitioner humbly and sincerely prays and asks the Supreme Court to accept certiorari and grant Petitioner the honor of having the highest court in the Country redress the improper treatment of his case in the Florida courts.

The Congress shall make no law abridging the right of the people to petition the government for redress of grievances. The people have the right to petition the governments without intervention or prohibition by the authorities.

From as early as Thomas Jefferson's writings, citizens have been protected in their right to petition against the governments oppression.

Due process of law is another descriptive name for legal, judicial and governmental fair play in dealing with their citizens.

Petitioner filed his original Petition/Complaint (A-3) to set aside a merger n Tallahassee, Florida, where the merger that Petitioner was seeking to set aside was alleged to have taken place. The subsequent transferring of the case to another jurisdiction just because real property was incidentally involved has deprived Petitioner of his rights to redress his grievance in the form that he chooses.

Petitioner has the right to seek redress of the wrong complained of in the court where the action was originally filed, Leon County, Florida, and this right cannot be taken away from him by the erroneous labeling of Petitioner's complaint as a complaint involving real property when in fact it was a complaint involving the setting aside of a merger.

Maple Leaf's amended complaint for declaratory relief filed in the lower court did not involve the subject matter of real property but involved the subject matter of merger. The amended complaint alleged that conditions precedent to a merger of Maple Leaf and Tree Farm did not occur and therefore a merger of the two corporation, Maple Leaf and Tree Farm, did not come into existence. The amended complaint simply demands that the court declare andy purported merger of the two corporation to be null and void and to continue the separate existence of Maple Leaf as if a merger had not occurred.

Paragraph one of Judge Hall's Order states that:

> 1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida.

(A-5)

This assessment of Petitioner's claim is absolutely contrary to every allegation in the complaint.

There are many rights, privileges, responsibilities that do come into existence once the issue of merger has been determine, however, these rights, privileges and responsibilities are not disputed in the complaint and will be automatically resolved by resolution of the merger issue.

Petitioner was initially informed by the Department of State, State of Florida that he must obtain a court order advising the Department of State, to "unfile" the merger. (A-8) Petitioner, in accordance with the Department of State's instruction, retained his attorney in Leon County, Florida seeking to set aside the merger.

It is the prerogative of Maple Leaf to select where his case shall be heard, so long as selection is one of the alternatives provided by the Florida Statutes. The selections should not be disturbed. Basswood v. Talquin Elec. Coop., 362 So. 2d 357 (Fla. ___ DCA 1978).

The local action rule in Florida does not apply to determine the forum where the litigation involved the recision of a contract for merger and merger of two corporations. The complaint of Petitioner is not to determine the question of title to land.

Equitable actions can be maintained in any jurisdiction where venue lies even though the suit will affect lands not within the territorial jurisdiction of the court. Singer v. Tobin, 201 So. 2d 799 (Fla. 3rd DCA 1967).

The Complaint filed by Maple Leaf is primarily a complaint to strip Tree Farm of their rights to a merger they could have acquired by the merger agreement if fraud had not taken place. The fact that the action will impact by operation of law on title to land does not cause the case to be transferred to where the land is located. Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA 1985). Also see letter dated October 29, 1990. (A-9)

Another approach florida courts have taken in coming to a fair resolution of whether or not to transfer an action where the land is located is to ask the question of whether or not there is property/real estate in litigation? If real property is not in litigation" then the local action rule would not apply. Green v. A.G.B.B. Hotels, Inc., 305 So. 2d 666 (Fla. 5th DCA 1987).

In Petitioner's case real property is clearly not in litigation; however merger is. A property issue will be resolved automatically by operation of law once the merger issue is determined.

The above sequence of events and treatment of Petitioner's complaint demonstrates that this Court must intervene so that Petitioner will be able to have his grievance addressed in the proper court of his choosing. To deny Petitioner his right to bring his action before the Leon County, Florida Court because of mislabeling of the complaint denies him of his right to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

III. CONCLUSION

This Court has the power to allow Petitioner his right to have his grievance addressed in the proper court and thereby guarantee him the protection of his Constitutional rights. Petitioner humbly and sincerely prays that this Court will permit him to present his case before the highest court in the country.

Respectfully submitted,

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(904) 432-7001
Attorney for Petitioner

JACK DAVID KELLY
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Pensacola, Florida 32503
(904) 438-4785
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for wait of Certiorari and appendix has been furnished to Phillip A. Bates, Esquire, 125 West Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida, 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, Post Office Box 13527, N. E. Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, Florida, 33410; Estate of George G. Phillips, Jr., Esquire, _____, by U.S. Mail this 23 day of July, 1992.

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No. _____

IN THE

SUPREME COURT
OF THE UNITED STATE

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DA' ID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,
Petitioner,

versus

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, Appellant, v. TREE FARM DEVELOPMENT CORP., et al., Appellees.	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED. CASE NO. 91-1185

Opinion filed November 7, 1991.

An Appeal from the Circuit Court for Leon County.
J. Lewis Hall, Jr., Judge.

Burton E. Strubhar, Pensacola, for Appellant.

Carl R. Pennington, Jr. and Cathi C. Wilkinson of Pennington, Wilkinson, Dunlap, Bateman and Camp, P.A., Tallahassee, for Appellee Tree Farm Development Corp.

Phillip A. Bates of Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, Pensacola, for Appellee E. D. "Bob" Pierce.

Emory O. Williams, Jr., West Palm Beach, for Appellee Estate of Emory O. Williams.

Stephen R. Moorhead of McDonald, Fleming & Moorhead, Pensacola, of Appellee Estate of Abraham L. Pierce.

PER CURIAM.

AFFIRMED.

JOANOS, C.J., and SMITH and ALLEN, JJ. CONCUR.

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 27, 1992

JACK D. KELLY, Appellant,	* * * *	CASE NO. 79,254
v.	* *	DISTRICT COURT OF
Tree Farm Development Corporation, ET AL., Appellees.	* * * *	APPEAL, 1ST DISTRICT - NO. 91-1185

It appearing to the Court that the District Court of Appeal, First District, did not declare invalid a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion filed within fifteen (15) days from the date of this order. See Article V, Section 3 (b) (1), Florida Constitution.

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Paul Hartsfield, Clerk
Hon. J. Lewis Hall, Jr., Judge

Burton E. Strubhar, Esquire
Albert C. Penson, Esquire
Emory O. Williams, Jr., Esquire
Carl R. Pennington, Esquire
Stephen Moorhead, Esquire
Phillip A. Bates, Esquire

[Seal]
Supreme Court
of the State of
Florida

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

Case No: 90-3378

JACK D. KELLY, individually
and JACK D. KELLY as President/
Shareholder of Maple Leaf
Development Corp.,

Plaintiff,
vs.

TREE FARM DEVELOPMENT CORP.;
EMORY O. WILLIAMS, JR., GEORGE
G. PHILLIPS, JR., E.D. BOB
PIERCE; and the Estate of
ABRAHAM L. PIERCE,
Defendants.

AMENDED
COMPLAINT

COMES NOW Plaintiff, JACK D. KELLY, individually ("Kelly"), and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp. ("Maple Leaf"), and sues Defendant, TREE FARM DEVELOPMENT CORP. ("Tree Farm"); EMORY O. WILLIAMS, JR. ("Williams"); GEORGE G. PHILLIPS, JR. ("Phillips"); E. D. BOB PIERCE ("B. Pierce"); and the Estate of ABRAHAM L. PIERCE ("A. Pierce"), and as grounds therefore, states:

GENERAL ALLEGATJONS

1. This is an action for declaratory judgement pursuant to Chapter 86, Fla. Stat.

2. Kelly is a resident of Escambia County, Florida and at, all times material hereto, was a shareholder, sole owner and President of Maple Leaf, a Florida corporation.

3. At all times material hereto, Maple Leaf is a Florida corporation, conducting business throughout the State of Florida.

4. At all times material hereto, Defendant, Tree Farm is a Delaware corporation, authorized to do business in the State of Florida with its principal place of business in Jacksonville, Florida. At all times material hereto, Tree Farm conducted business in Leon and Escambia County, Florida.

5. Williams is a resident of Palm Beach Gardens, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

6. Phillips is a resident of Escambia County, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

7. B. Pierce is a resident of Escambia County, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

8. At all times material hereto, A. Pierce was resident of Escambia County, Florida and was a former director of Maple Leaf. A. Pierce died October30, 1987 and Stephen R. Morelead of Escambia County, was appointed as Personal Representative (Case No. 88-82CT-03, Division D). The Estate of A. Pierce may claim some right or interest in Maple Leaf.

9. On about March 17, 1971, Maple Leaf executed a Purchase Agreement with Barnett Bank of Pensacola, formerly The First Bank & Trust Co. of Pensacola, for certain property located in Escambia County, Florida more particularly described in the deed for said property, issued on July 1, 1971. (See Composite Exhibit "A" attached and incorporated herein.)

10. On about July 1, 1971, Maple Leaf Mortgaged to Barnett Bank of Pensacola the above-described real property located in Escambia County, Florida. (See Exhibit "B" attached hereto and incorporated herein.)

11. The mortgage was guaranteed by Kelly, Williams, Phillips, B. Pierce and A. Pierce.

12. This cause of action accrued in Leon County, Florida,

upon the filing of the Agreement of Merger between Maple Leaf and Tree Farm on February 1, 1972, in the office of the State of Florida, Department of State. (See Composite Exhibit "C" attached in incorporated herein.)

13. The Agreement of Merger, entered in on January 18, 1972, provided that Maple Leaf would merge into Tree Farm and that Tree Farm would be the surviving corporation.

14. Upon the merger of the two corporations, each share of Maple Leaf stock was to be converted into 47.619 shares of Class B stock of Tree Farm.

15. At the date of merger, Kelly would hold 1,238 shares of Tree Farm stock.

16. Pursuant to the terms of the Agreement of Merger, each shareholder of Maple Leaf was to receive its Tree Farm shares upon surrender of shares of Maple Leaf and the parties entered into additional agreements to structure the purchase of the shares.

17. Pursuant to the terms of the Agreement of Merger the agreement could not be effective until the date upon which the last act required to complete the merger under the laws of Florida and Delaware was performed. (See Article "Fourth" (c).)

18. Pursuant to the terms of the Agreement of Merger, title to real property of Maple Leaf did not vest in Tree Farm until the merger became effective. (See Article "Fourth" (d).)

19. Florida Stat. §608.041(2) (1972), provided that the effective date of merger may be specified in the agreement of merger, but in no event could the effective date be prior to, or more than ninety (90) days after filing the Agreement of Merger.

20. On about May 27, 1971, prior to entering the Agreement of Merger, Maple Leaf assigned eighty-four (84) shares of stock (all of its outstanding stock) to Pensacola Loan & Savings Bank as security for a loan in the amount of $60,090.15. (See Exhibit "D" attached and incorporated herein.)

21. On about January 25, 1972, just preceding the merger of the corporations, Kelly, Williams, Phillips, B. Pierce and A. Pierce, all of Maple Leaf, executed a Security Agreement with Pensacola Loan & Savings Bank pledging such shares of common stock in Tree Farm as they may have issued to them as security for the loan to Maple Leaf, described in paragraph 20

above. (See Exhibit "E" attached and incorporated herein.)

22. Upon the effective date of the merger, Maple Leaf and its shareholders were unable to exchange their shares of Maple Leaf stock and did not do so within 90 days of the date upon which the Agreement of Merger was filed.

23. Pursuant to Fla. Stat. §608.22 (1972), upon merger of the corporation, all property owned by Maple Leaf would become the property of Tree Farm, however, Barnett Bank's mortgage was unimpaired by the merger.

COUNT I

24. Paragraphs 1-23 are realleged as if set forth herein.

25. There currently exists an actual controversy between the parties arising out of the merger of Maple Leaf and Tree Farm.

26. The terms of the Agreement of Merger as controlled by Fla. Stat. §608.041, provided that the last act to effectuate the merger should have occurred within ninety (90) days of the filing of the Agreement of Merger.

27. The condition precedent to the merger of Maple Leaf and Tree Farm did not occur.

28. Tree Farm has not obtained title to the property owned by Maple Leaf.

29. On about November 14, 1977, Barnett Bank of Pensacola, issued a deed to Tree Farm for a portion of the property previously conveyed to Maple Leaf, excluding and reserving an interest in all oil, gas or mineral royalties derived from the property. (See Exhibit "F" attached and incorporated herein.) Title to the subject property remains in the name of Maple Leaf.

30. At the time of the conveyance to Tree Farm, Maple Leaf had not divested itself of its interest in the property.

31. Kelly, individually, as original owner of Maple Leaf and as President and shareholder of Maple Leaf, has filed and recorded several instruments, documenting Maple Leaf's continued interest in the real property owned. (See Composite Exhibit "G" attached and incorporated herein.)

32. Williams, Phillips, B. Pierce and A. Pierce may all, or each, claim some right or claim in Maple Leaf. Any such claim

is null and void and is otherwise inferior to the claim of Kelly.

33. Williams, Phillips, B. Pierce and A. Pierce each received an interest in Maple Leaf, conditioned upon consideration which included the assumption and satisfaction of Maple Leaf's obligations and of providing services to and on behalf of Maple Leaf. Each failed to satisfy said obligations and to provide the required services.

34. Williams, Phillips, B. Pierce and A. Pierce each guaranteed payment of the sales agreement between Barnett Bank and Maple Leaf.

35. Phillips was required, as a condition to the purchase of stock from Kelly, to pay all obligations to Pensacola Loan & Savings Bank (and others). (See Exhibit "H" attached and incorporated herein.)

36. Williams, Phillips, B. Pierce and A. Pierce failed to perform their respective services and obligations, including satisfaction of the obligations to Pensacola Loan & Savings Bank and Barnett Bank. (See Exhibit "I" attached and incorporated herein.)

37. Kelly and Maple Leaf require a declaration of their respective right to declare the merger null and void and to continue the separate existence of Maple Leaf as if the merger had not occurred.

38. Fla. Stat. §86.031 authorizes the construction of written instruments by declaratory judgment.

39. All parties who may claim an interest in this action are before the court.

WHEREFORE, Plaintiffs request this court:

A. Take jurisdiction of the parties hereto and the subject matter of this action.

B. Declare the respective rights of the parties to the Agreement of Merger and enter its order declaring the merger ineffective and allowing Maple Leaf to maintain its separate existence as if the merger had not occurred.

COUNT II

40. Paragraphs 1-23 are realleged as if set forth herein.

41. Kelly and Maple Leaf have filed and recorded several instruments demonstrating a claim of title to the property. (See Composite Exhibit "G"). Plaintiff's claim of title is valid.

42. Title to the property has not vested in Tree Farm.

43. Tree Farm, through the Articles of Merger and through the subsequent deed, claims adverse title to the subject property.

44. Tree Farm's claim of title is invalid in that the previously described conditions precedent to the merger of Maple Leaf and Tree Farm never occurred.

45. Tree Farm has no valid claim of title to the property.

46. Kelly and Maple Leaf remain ready, able and willing to do equity with regard to obtaining title to the property.

47. The rights of Kelly and Maple Leaf are superior to the claims of Tree Farm.

48. The parties require a declaration as to their respective rights and interests in the subject property.

49. All parties having an interest in this action are before the court.

WHEREFORE, Plaintiffs request this court declare the respective rights of the parties to the subject property and enter its order declaring the property to be titled in Kelly and Maple Leaf.

DATED this _____day of September, 1990.

Respectfully submitted

/S/

Albert C. Penson
Fla. Bar ID: 334510
Hilton, Hilton, Kolk & Penson
Post Office Box 1327
Tallahassee, Florida 32302
(904) 561-8000

Attorneys for Plaintiff

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, INDIVIDUALLY; AND JACK D. KELLY AS PRESIDENT/SHAREHOLDER OF MAPLE LEAF DEVELOPMENT CORP.,

PLAINTIFFS,

VS. CASE NO. 90-3398

TREE FARM DEVELOPMENT CORP. EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; AND THE ESTATE OF ABRAHAM L. PIERCE.

DEFENDANTS.

_____/

MOTION TO DISMISS
FOR LACK OF JURISDICTION OF THE SUBJECT MATTER

COMES NOW the Defendant, E. D. Bob Pierce, by and through his undersigned attorneys, pursuant to Rule 1.140 (b), Florida Rules of Civil Procedure, and in support hereof further says:

1. The Plaintiffs' Amended Complaint seeks a declaration with respect to the fights of the parties to certain real property situate in Escambia County, Florida.

2. Since this action related to real estate and the rights of parties therein, the action must be brought in the county where the property is located. Georgia Casualty Company vs. O'Donnell, 109 Fla. 290, 147 so. 267 (1933).

3. This "local action ruie" is jurisdictional. Board of Trustees of Internal Improvement Trust Fund vs. Mobil Oil Corporation, 455 So. 2d 412 (Fla. 2d DCA 1984), modified on other grounds, 492 So. 339, cert. denied, 479 U.S. 1065, rehearing denied, 480 U.S. 941.

4. This action is "local" in that it touches and concerns real property and the rights of parties thereto. This court lacks subject matter jurisdiction of this proceeding.

WHEREFORE, this Defendant prays that the Court will consider the foregoing and dismiss the Plaintiffs' Amended Complaint with prejudice.

/S/

PHILIP A. BATES
BATES & TIPTON, P.A.
700 South Palafox, Suite 3-A
Pensacola, Florida 32501
(904) 469-00202
Attorney for E. D. Bob Pierce
Florida Bar No.: 228354

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss for Lack of Jurisdiction of the Subject Matter has been furnished to Albert C. Penson, Post Office Box 1327, Tallahassee, Florida 32302, by United States mail, postage prepaid, this the 15 day of October, 1990.

/S/

Philip A. Bates

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK. D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff,

vs. CASE NO. 90-3398

TREE FARM DEVELOPMENT COP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and the Estate of ABRAHAM L. PIERCE,

Defendants.

_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TRANSFER

THIS CAUSE having come on before the Court upon the Motion of Tree Farm Development Corporation, and others, to dismiss for lack of subject matter jurisdiction and to abate or, in the alternative, transfer for improper venue; and the Court having reviewed the Motions and having heard the argument of counsel and being otherwise fully advised in the premises, finds and decides as follows:

1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the action is, therefore, a "local action" it should have been filed in Escambia County, Florida.

2. Under the circumstances, the case should be transferred to Escambia County, Florida. It is, thereupon,

CONSIDERED, ORDERED AND ADJUDGED that this case shall be and the same is hereby transferred to Escambia County, florida. The Clerk of this Court shall transfer the pleadings file, or a copy thereof, as may be appropriate, to the Clerk of the Circuit Court in and for Escambia County, florida. The Plaintiff shall be responsible for any filing fees or other transfer costs which may be incurred or required by the Clerk of this Court, or the Clerk of the Circuit Court in and for Escambia County, Florida, in connection with such transfer. The Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this Court and the same remain pending. Accordingly, and under the applicable Rules of Civil Procedure, no Answer or other responsive pleading is yet due by those Defendants who have filed with motions to Dismiss for failure to state a cause of action.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, florida, this 12 day of March 1991

CIRCUIT JUDGE

Copies furnished to:

Philip A. Bates
Stephen R. Moorhead
Carl R. Pennington, Jr.
Emory O. Wiliams, Jr.
Albert C. Penson

CR015.PAB

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Docket No. 91-01185

JACK D. KELLY,
Appellant,
v.
TREE FARM DEVELOPMENT CORP., ET AL
Appellees,

MOTION FOR REHEARING

On Appeal from the Circuit court
Leon County, Florida
Case No. 91-3398-CA-01

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Fla. Bar No. 176414
Attorney for Appellant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY,
Appellant, DOCKET NUMBER 91-1185
v.
TREE FARM DEVELOPMENT CORP., et as
Appellee.
_____/

MOTION FOR REHEARING

COMES NOW THE APPELLANT, JACK D. KELLY, by and through his undersigned attorney, pursuant to Fla. R. App. P., Rule 9.330, and requests a rehearing and would argue as follows:

1. The affirmance of the lower court's ruling occurred on the 7th day of November, 1991, and this Motion for Rehearing is timely filed.

2. Appellant, in his appeal, raises various issues but the single dispositive issue deals with whether or not the lower court improperly applied the local action rule to Appellant's complaint that was filed in Leon County.

3. Appellant's initial brief and Response to Answer Brief correctly set forth the law that should be applied to the facts of this appeal.

4. The Court has overlooked or misapprehended the law as ruled in the cases of Lakeland Ideal Farm and Drainage District v. Mithcell, 122 So. 2d516 (1929), Publix Supermarkets v. Cheesbor Roofing Co., 502 So. 2d 484 (Fla. 5th DCA-1987) wherein it has been well established that the simple involvement of real property in an action does not render that action subject to the local action rule but the court must look at the underlying major questions involved in the litigation.

5. The Court has overlooked or misapprehended the facts of the appeal in that the underlying major question involved in Appellant's complaint involved merger and not real estate.

6. The Court has overlooked or misapprehended the law as decided in Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA, 1985)

and Singer v. Tobin, 201 So. 2d 799 (Fla. 3rd DCA, 1967 wherein it is well established that courts of equity have jurisdiction where venue lies even though the suit will affect lands (real property) not within the territorial jurisdiction of the court.

7. The court has overlooked or misapprehended the facts and law in that Appellant's complaint involved equitable jurisdiction alleging fraud and demanding rescission/cancellation of a purported merger.

8. A proper application of the law to the facts of this appeal mandate the finding that an action to set aside a merger is not subject to the local action rule and that Appellant's complaint does not involve real estate in litigation but involves a merger in litigation. There are no questions to be determined regarding real estate once the merger issue is determined and therefore the lower Court's transfer of Appellant's complaint from Leon County to Escambia County, is in err.

9. The Appellant requests hearing on this Motion for Rehearing to be set for more than thirty days hence to allow Appellant to file briefs with the Court on matters of law relating to the Motion and Appeal.

WHEREFORE, Appellant respectfully demands a rehearing on his Appeal and thirty days from the date of filing to file memoranda.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished to Phillips A. Bates, Esquire, 125 West Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida, 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, Post Office Box 13527, N. E., Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, Florida, 33410; Estate of George G. Phillips, Jr., Esquire, _____ _____, by U.S. Mail this 21st day of November, 1991.

/s/

BURTON E. STRUBHAR
3298 Summit Blvd., Ste. 31B
Post Office Box 30215
Pensacola, Florida 32503
(904) 432-7001
Fla. Bar No. 176414
Attorney for Appellant

IN THE SUPREME COURT OF FLORIDA

JACK D. KELLY, individually and
JACK D. KELLY, as President/Shareholder
of Maple Leaf Development Corp.,
Appellant,

v.

Case. No. 79,254
District Court of Appeal
1st District-No. 91-1185

TREE FARM DEVELOPMENT CORPORATION,
ET AL.,
Appellees

MOTION FOR SUPREME COURT TO ACCEPT JURISDICTION OR IN THE ALTERNATIVE, TO REINSTATE APPEAL

Appellant, JACK D. KELLY, hereinafter referred to as Maple Leaf, moves for the Supreme Court to exercise its jurisdiction to hear his appeal from the First District Court of Appeal's decision in case number 91-1185 and for grounds sincerely prays that the court consider the following:

1. Jurisdiction does exist for this court to hear Maple Leaf's appeal in that the affirmance of the lower court's decision denies Maple Leaf and Jack Kelly of their right to access the proper court of its choice in violation of Florida Statute 47.011.

2. Jurisdiction does exist for this court to hear Maple Leaf's appeal to the Supreme Court, in that affirmance of the lower court's decision denies Maple Leaf and Jack D. Kelly of their right to due process of law in violation of Article I, Section Nine, Constitution of the State of Florida, which mandates that "no person shall be deprived of life, liberty or property without due process of law..." (Florida Constitution, Art.1, Section 9).

3. Jack D. Kelly, Appellant, is the sole owner of all assets of the corporation known as Maple Leaf Development Corporation, Appellant, and has not relinquished that ownership, however, Tree Farm claims that a merger occurred between Maple Leaf and Tree Farm that transfers ownership of Maple

Leaf to Tree Farm. This change of ownership is alleged to have occurred because Tree Farm filed a fraudulent merger document with the Secretary of State's Office in Leon County, Florida. Maple Leaf filed its action in Leon County to set aside this fraudulent merger. If the fraudulent merger is allowed to stand it will deprive Maple Leaf and Jack D. Kelly of their assets of the corporation.

4. After Maple Leaf's complaint was filed in Leon County, Tree Farm made its motion to dismiss and the lower court ruled that the complaint must be transferred to Escambia County, Florida because some of the assets of the corporation involved real property located in Escambia County, Florida and therefore the Local Action Rule applies to Maple Leaf's complaint and requires the complaint to be heard in Escambia County, Florida. This ruling is the subject matter of Maple Leaf's appeal, which is now pending before this court.

5. The subject matter of Maple Leaf's complaint has always been whether or not a merger took place between Maple Leaf and Tree Farm. If a merger did not take place all parties to this action would agree that tree farm would not own any assets of the Maple Leaf corporation. The merger issue must be determined before any rights to real property or other assets can possibly be determined.

6. The application of the "Local Action Rule" has no reasonable relationship to Maple Leaf's action to set aside a merger and therefore should not be applied to a complaint to set aside a merger just because the corporations might own real property.

7. Maple Leaf has a statutory right to bring its action to set aside a merger where the fraudulent merger document was filed. Actions shall be brought only in the county where the defendant resides, where the cause of action accrued or where the property in litigation is located. (Section 47.011, Florida Statute.) maple Leaf brought its action where its cause of action accrued and it must not be denied access to the proper court.

8. Tree Farm has attempted to cast Maple Leaf's complaint as an action regarding real property, when in fact the complaint is an action to determine the validity of a merger. This denies

Maple Leaf access to the forum Maple Leaf properly chose. To deny this choice is a violation of Florida's venue statute, Section 47.011, Florida Statutes. Just because Maple Leaf owned real property does not require an action determining the validity of a merger to be heard only in the circuit court where the property is located.

9. The District Court of Appeal's opinion in affirming the lower court's decision in effect, declares invalid Florida's venue statute and in so ruling denies Maple Leaf of its constitutional right of due process of law as guaranteed by Article 1, Section Nine, Florida Constitution, providing, that no person shall be deprived of property without due process of law.

10. It is permissible to determine the question of the court's jurisdiction at any time in the proceedings. (13 Fla. Jur. 2d, Section 28). Maple Leaf's complaint has been cast by Tree Farm erroneously and in so doing, the complaint and now appeal to this court is being denied because of jurisdictional reasons. This court can correct the jurisdictional question by accepting jurisdiction and allowing briefs to be submitted for resolution of the issues brought before the First District Court of Appeal.

A court cannot improperly refuse to exercise jurisdiction once it is shown to exist (13 Fla. Jur.2nd, Section 30). Jurisdiction did exist for the Leon County Circuit Court to hear Maple Leaf's complaint. This denial of Maple Leaf's due process of law by the lower courts ruling and the affirmance of that ruling by the first district, mandates that this court set the jurisdictional issue to rest by accepting the case for review and ordering the parties' briefs to be filed.

WHEREFORE, Maple Leaf and Jack D. Kelly sincerely pray that this court will accept jurisdiction and require briefs to be submitted for further review.

_____/S/_____
BURTON E. STRUBHAR
3298 Summit Blvd., Ste. 31B
Pensacola, Florida 32502
(904) 432-7001
Fla. Bar. No. 176414

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to Philip A. Bates, Esquire, 125 W. Romano Street, Pensacola, Florida 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Ste. 3C, Pensacola, Fla. 32501; Carl R. Pennington, Esquire, 3376 Capitol Circle, P. O. Box 13527, N. E., Tallahassee, Fla. 32317; Emory O. Williams, Esquire 306 Third Lane, Palm Beach Gardens, Florida 33410; by U. S. Mail this 10th day of February, 1992.

/S/
BURTON E. STRUBHAR

FLORIDA DEPARTMENT OF STATE
JIM SMITH
SECRETARY OF STATE

October 16, 1990

Mr. Jack Kelly
Jamestown Apartments
3331 Summit Boulevard
Apartment 87
Pensacola, Florida 32503

Dear Mr. Kelly:

This letter is at your request regarding MAPLE LEAF DEVELOPMENT CORPORATION which was incorporated on April 6, 1970 and subsequently merged into TREE FARM DEVELOPMENT CORPORATION, a Delaware corporation on February 1, 1972.

According to information you supplied this office the terms of the merger agreement were never met and you are seeking a court order to, in effect, "lay aside" the merger.

Last year you attempted to reinstate the MAPLE LEAF DEVELOPMENT CORPORATION and this office advised you that there was no statutory authority to reinstate a corporation which had merged with another corporation. As provided in 607.1106 (1) (a) the corporation merging into the surviving corporation ceases to exist at the time of the merger. The only corporation which can be reinstated is a corporation that has been administrateively (involuntarily) dissolved, and action taken by this office for failure to file the corporation annual report.

After this office explained to you that there was no authority under which you could reinstate the original corporation, you decided to form a new corporation under the same name on October 3, 1989.

If your intent is to reinstate the original MAPLE LEAF DEVELOPMENT CORPORATION, a court order advising this office to "unfile" the merger for failure to meet the terms of the merger agreement must be obtained. When the court order is filed with this office the merger of the two corporations will be "unfiled" and at that time the original MAPLE LEAF DEVELOPMENT CORPORATION will be an inactive corporation which can then be reinstated.

I trust this information is sufficient for your needs. Further filing questions and fee information can be obtained from this office when you need them.

Sincerely,

/s/
(Mrs.) Karon Beyer, Bureau Chief
Bureau of Commercial Recording

KB/ml
cc: Mr. Al Penson
P.O. Box 1327
Tallahassee, Florida 32302

LAW OFFICES
GLENN R. GRONLUND
FIRST FIDELITY BANK BUILDING
1301 ATLANTIC AVENUE
ATLANTIC CITY, NEW JERSEY 08401

October 29, 1990

Philip A. Bates, Esquire
Bates & Tipton, P.A.
700 South Palafox, Suite 3A
Pensacola, FL 32501

Re: Kelly v. Tree Farm Development Corporation, et al.

Dear Mr. Bates:

We have carefully reviewed the Amended Complaint which has been filed in this action. As I am sure you recognize, this Declaratory Judgement seeks to undo the terms of a certain merger agreement enteredinto by the various parties. The plaintiff is suing his partners for failing to live up to the terms and conditions of that agreement and to return the parties to where they were prior to that agreement.

As such, there is being no claim made against the title to Tree Farm properties, as such. The only claims are breach of contract actions which are not covered by the title insurance policy.

Accordingly, we must respectfully advise you that there is no title insurance for the claims being alleged by Jack Kelly against Tree Farm Development Corporation. As such, we must decline to give you any instructions as to how you may conduct the breach of contract litigation. The construction of the interest of the various parties is dependent upon the Court determining who breached the contract, not whether there was good and sufficient title at issue in the first place. If you have any other additional information with which you would like to acquaint us, perhaps

we coud review this matter. But as presently presented. There is no cause of action stated for which there is title insurance under the policy issued.

Very truly yours,

CHELSEA TITLE AND GUARANTY COMPANY

By: /s/
Glenn R. Gronlund, Esq.
General Counsel